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Ng Kok Pooi v Brunswood ID Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING PETITION NO D5–26–31 OF 2005

B RAMLY ALI J

19 APRIL 2006

Civil Procedure — Estoppel — Issue estoppel — Wider concept of — When applicable

C

Civil Procedure — Striking out — Petition brought for minority oppression — Application to strike out brought on the basis of no locus standi and res judicata — Whether relevant for allegation of oppression to be substantiated

D

Companies and Corporations — Oppression — Relief — Remedy in cases of oppression — Striking out of petition — Petitioner having no locus standi to file petition — Doctrine of res judicata and issue estoppel applicable — Whether relevant for allegation of oppression to be substantiated —

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Companies and Corporations — Members' rights — Oppression — Petition for — Whether petitioner had locus standi to file petition against respondents — Whether petitioner a registered shareholder — Whether petitioner estopped from exercising statutory rights — Whether petition ought to be struck out — Companies Act 1965 s 181

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The petitioner and BISB entered into an agreement to incorporate the first respondent. The agreement, inter alia, provided that the petitioner would contribute assets amounting to RM500,000. He would in turn receive a sum of RM300,000 cash and 40% equity in the first respondent. The petitioner contributed the assets, the first respondent was incorporated and the petitioner was paid the RM300,000. His 40% equity was also issued and was awaiting transfer. However, relations between the shareholders soured, the business of the first respondent suffered and in consequence, its shares dropped in value. The petitioner then filed a suit in the sessions court against BISB claiming, inter alia, for RM200,000 being the balance of the value of assets contributed, and also for the monetary value of his 40% equity. BISB contended that the petitioner was not entitled to both the full value of the assets and to the 40% equity, but only to RM300,000 (which had already been paid to the petitioner) and 40% equity in the first respondent. In the proceedings, the petitioner confirmed on oath that he did not want to accept the transfer of the 40% equity to himself. Further, in the proceedings: (i) the petitioner did not seek the delivery of the 40% equity, though such relief was pleaded; (ii) refused to accept the transfer of the 40% equity as he intended to sell it to the other respondents for RM200,000; and (iii) equated a sum of RM200,000 as representing his 40% equity. The sessions court inter alia ordered BISB to pay the petitioner RM200,000 being

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the balance of the value of assets, against which decision BISB appealed. Pending appeal, the petitioner brought a petition under s 181 of the Companies Act 1965. He claimed to be the beneficial owner of the 40% equity in the first respondent despite the fact that he took no steps to register himself as a shareholder and in fact refused to accept the transfer of the 40% equity to himself. The respondents applied to strike out the petition on the basis that the petitioner had no locus standi as he was not a registered member of the first respondent; and that he be estopped, by his conduct in the sessions court proceedings, from filing and proceeding with the petition on the basis that he was a shareholder or member of the first respondent with the rights of a shareholder/member.

Held, allowing the respondents' application with costs and striking out the petition:

(1) In the instant case, the petitioner was not a registered shareholder or member of the first respondent. The petitioner was unable to demonstrate that his name appears on the first respondent's company register at the date of presentation of the petition. The s 181 remedy is a statutory remedy and unless the applicant came squarely within the section, the court could not to entertain his action. Further, by his conduct in the sessions court suit, indicating that he had waived his right to be a member or shareholder of the first respondent, he should be estopped from stating or claiming that the respondents were 'using statute as an engine of fraud' to assert that he had no locus standi to file the petition. He should be estopped from exercising the statutory rights provided for the benefit of registered shareholders or members of a company (see paras 27, 30–31);*Owen Sim Liang Khui v Piasau Jaya Sdn Bhd* [1996] 1 MLJ 113 and *Verghese Mathai v Telok Plantations Sdn Bhd* [1988] 2 MLJ 181 followed; *Re M Dalley & Co Pty Ltd* (1968) 1 ACLR 489 and *Niord Pty Ltd v Adelide Petroleum NL* (1990) 8 ACLC 684 referred (see para 31).

(2) The limited concept of estoppel applies where there is: (i) similarity in the cause of action; (ii) similarity in remedies claimed; and (iii) similarity in the parties. However, the wider concept of estoppel is not confined to causes of action or issues which the court is actually asked to decide or has already decided. It covers also causes of action or issues of facts which, though not already decided as a result of the same not being brought forward due to negligence, inadvertence or deliberately, are so clearly part of the subject matter of the litigation and so clearly could have been raised, that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of such (see para 37); *Asia Commercial Finance (M) Sdn Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 followed (see para 37).

(3) This was a clear case where the doctrine of res judicata and issue estoppel in the wider sense as laid down by the Supreme Court in *Asia Commercial Finance* arose. The petitioner could not argue or be allowed to pursue a claim under s 181 to claim oppression as a 'beneficial shareholder' of the first respondent (see para 41).

(4) The court need not and should not go into the minute examination of alleged instances of oppression and/or fraud at this stage. If the petitioner has no locus standi to file the petition or where the doctrine of res judicata or issues estoppel

A arises, it does not matter whether the allegation of oppression and/or fraud is substantiated or otherwise (see para 43).

[Bahasa Malaysia summary

B Pempetisyen dan BISB telah memasuki satu perjanjian untuk memperbadankan responden pertama. Perjanjian itu, antara lain, memperuntukkan bahawa pempetisyen akan melabur aset berjumlah RM500,000. Beliau sebagai balasan akan menerima sejumlah RM300,000 tunai dan 40% ekuiti dalam responden pertama. Pempetisyen telah menyumbang aset tersebut, responden pertama telah diperbadankan dan pempetisyen telah dibayar RM300,000. Ekuiti 40% beliau juga
C telah dikeluarkan dan menanti pemindahan. Bagaimanapun, hubungan antara pemegang saham menjadi tidak baik, perniagaan responden pertama terjejas dan akibatnya, saham-sahamnya susut nilai. Pempetisyen berikutan itu telah memfailkan guaman di mahkamah sesyen terhadap BISB dengan menegaskan bahawa pempetisyen tidak berhak terhadap kedua-dua nilai sepenuhnya aset-aset dan 40 %
D ekuiti tersebut, tetapi hanya hanya kepada RM300,000 (yang telahpun dibayar kepada pempetisyen) dan 40% ekuiti dalam responden pertama. Dalam prosiding, pempetisyen telah mengesahkan atas akuan bersumpah bahawa beliau tidak akan menerima pemindahan 40% ekuiti itu sendiri. Bahkan, dalam prosiding: (i) pempetisyen tidak memohon pemindahan 40% ekuiti tersebut, meskipun relief
E sedemikian telah diplidkan; (ii) enggan menerima pemindahan 40% ekuiti tersebut kerana beliau berhasrat untuk menjualnya kepada responden-respodnen lain untuk RM200,000; dan (iii) menyamakan sejumlah RM200,000 sebagai mewakili 40% ekuitinya. Sementara menunggu rayuan, pempetisyen telah mengemukakan satu petisyen di bawah s 1818 Akta Syarikat 1965. Beliau mendakwa dirinya pemilik benefisial kepada 40% ekuiti dalam responden pertama meskipun beliau tidak
F mengambil apa-apa langkah untuk mendaftar dirinya sebagai pemegang saham dan bahkan enggan menerima pemindahan 40% ekuiti itu kepada dirinya. Responden-responden telah memohon untuk membatalkan petisyen itu atas alasan abahwa pempetisyen tiada locus standi kerana beliau bukan ahli berdaftar kepada responden pertama; dan agar beliau diestopkan, melalui perbuatannya dalam
G prosiding mahkamah sesyen, daripada memfailkan dan meneruskan petisyen tersebut atas alasan bahawa beliau adalah pemegang saham atau ahli responden pertama dengan hak seorang pemegang saham/ahli.

H **Diputuskan**, membenarkan permohonan responden-repsonden dengan kos dan membatalkan petisyen:

(1) Dalam kes semasa, pempetisyen bukan pemegang saham atau ahli berdaftar responden pertama. Pempetisyen tidak dapat menunjukkan bahawa namanya terdapat atas daftar syarikat respodnen pertama pada tarikh penyampaian
I petisyen itu. Remedi s 181 merupakan remedi statutori dan kecuali jika pemohon terangkum dalam seksyen tersebut, mahkamah tidak dapat melayan tindakannya. Bahkan, melalui perbuatannya dalam guaman mahkamah sesyen, menunjukkan bahawa beliau telah mengetepikan haknya menjadi ahli atau pemegang saham responden pertama, beliau sepatutnya diestopkan daripada menyatakan atau mendakwa bahawa responden-responden 'using statute as an

engine of fraud' untuk menegaskan bahawa beliau tiada locus standi untuk memfailkan petisyen tersebut. Beliau patut diestopkan daripada menggunakan hak statutori yang diperuntukkan untuk manfaat pemegang sahan atau ahli syarikat yang berdaftar (lihat perenggan 27, 30–31); *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd* [1996] 1 MLJ 113 dan *Verghese Mathai v Telok Plantations Sdn Bhd* [1988] 2 MLJ 181 diikut;*Re M Dalley & Co Pty Ltd* (1968) 1 ACLR 489 dan *Niord Pty Ltd v Adelide Petroleum NL* (1990) 8 ACLC 684 dirujuk (lihat perenggan 31).

(2) Konsep terhad mengenai estopel terpakai di mana terdapat: (i) persamaan dalam kausa tindakan; (ii) persamaan dalam remedi yang dituntut; dan (iii) persamaan dalam pihak-pihak. Bagaimanapun, konsep secara meluas estopel tidak terbatas kepada kausa tindakan atau isu-isu yang mahkamah sememangnya perlu diputuskan atau telahpun diputuskan. Ia juga meliputi kausa tindakan atau isu-isu fakta yang mana, meskipun belum diputuskan akibat yang sama ia belum dikemukakan kerana kecuaian, kelalaian atau secara sengaja, adalah jelas sebahagian daripada perkara pokok litigasi dan adalah jelas ia boleh ditimbulkan, bahawa ia akan merupakan satu penyelahgunaan proses mahkamah untuk membenarkan prosiding baru dimulakan berhubung dengannya (lihat perenggan 37) *Asia Commercial Finance (M) Sdn Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 diikut 9lihat perenggan 37).

(3) Ia merupakan satu kes nyata di mana doktrin res judicata dan isu estopel dalam maksud yang lebih luas seperti yang dinyatakan oleh Mahkamah Agong dalam *Asia Commercial Finance*. Pempetisyen tidak boleh berhujah atau dibenarkan meneruskan tuntutan di bawah s 181 untuk mendakwa berlaku penindasan sebagai 'beneficial shareholder' responden pertama (liaht perenggan 41).

(4) Mahkamah tidak perlu dan tidak patut begitu teliti dalam pemeriksaan keadaan penindasan yang dikatakan dan/atau fraud di peringkat ini. Jika pempetisyen tiada locus standi untuk memfailkan petisyen atau di mana doktrin res judicata atau isu estopel timbul, ia tidak penting sama ada pengataaan penindasan dan/atau fraud itu dibuktikan atau sebaliknya (lihat perenggan 43).]

Notes

For a case on relief of oppression, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 516.

For cases on issue of estoppel, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 2322–2330.

For cases on oppression of members' rights, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 440–483.

For cases on petition brought for minority oppression, striking out generally, see 2 *Mallal's Digest* (4th Ed) paras 5896–6002.

Cases referred to

Asia Commercial Finance (M) Sdn Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189 (folld)

Central Secutiries (Holdings) Bhd v Haron bin Mohamed Zaid [1979] MLJ 244 (refd)

A *Len Chee Omnibus Co Ltd, Re; Chin Sow Lan v Lee Chee Omnibus Co Ltd & Ors* [1969] MLJ 202 (refd)
M Dalley & Co Pty Ltd, Re (1968) 1 ACLR 489 (refd)
Niord Pty Ltd v Adelide Petroleum NL (1990) 8 ACLC 684 (refd)
Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor [1996] 1 MLJ 113 (folld)
B *Public Trustee v Kenward* [1967] 1 WLR 1062 (refd)
SCF Finance Co Ltd v Masri & Anor (No 3) [1987] 1 All ER 194 (refd)
Verghese Mathai v Telok Plaintations Sdn Bhd & Ors [1988) 3 MLJ 216 (folld)
Yat Tung Investment Co v Dae Hong Bank & Anor [1975] 2 WLR 690 (refd)

Legislation referred to

C Companies Act 1965 ss 16(6); 221(2)(f); 162; 181
Rules of the High Court 1980 O 18 r 19(1) (b), (c), (d)

Colin Andrew Pereira (Goh Wong & Pereira) for the petitioner.
Renu Zechariah (Rosley Zechariah) for the respondents.

D **Ramly Ali J:**

[1] The petitioner (who claimed to be a beneficial shareholder of respondent 1) files a petition (encl 1) against all the respondents under s 181 of the Companies Act
E 1965, in that the affairs of first respondent were conducted and the powers of the directors were exercised in a manner which is oppressive; and/or in disregard of his interest; and/or which unfairly discriminates against; and/or is otherwise prejudicial to one or more members of the first respondent.

F **[2]** The petitioner further contends that the affairs of the first respondent should not be conducted in a manner likely to defeat the legitimate expectations of one or more its members. The petitioner contends that it was always intended that all parties would act in utmost goodfaith and that first respondent was formed on the basis of personal relationship involving mutual confidence. The petitioner further contends that the nature of the first respondent is one in which there is an understanding that
G all the shareholders would participate in management and share in the profits of the first respondent.

[3] The petitioner also contends that first respondent acting through the second, third and fourth respondents has breached its obligations imposed by law, equity and
H under the shareholders agreement.

[4] The respondents filed an application (vide notice of motion in encl 8) to strike out the petition pursuant to O 18 r 19(1) (b), (c) or (d) of the Rules of the High Court 1980; and/or under the inherent jurisdiction of the court; or s 221(2)(f) of the
I Companies Act 1965, on the basis that:

(a) the petitioner has no locus standi to present this petition as he is not a registered member of the first respondent;

(b) the petitioner is estopped by his conduct in the previous proceedings filed by him (in the Kuala Lumpur Session Court) from filing and proceeding with the

petition on the basis that he is a shareholder or member of the first respondent with the rights of a shareholder/member.

FACTUAL BACKGROUNDS

[5] On or about August 1996, the petitioner (who was a partner of a business known as Kontad Interior Decorations) with one Mr Kew Thin Song ('Kew') and Brunswood Industry Sdn Bhd ('BISB') decided to form a joint venture company for the purpose of undertaking and providing marketing and services involved in the business of interior decoration.

[6] A shareholders agreement was drawn up and dated 12 August 1996 between the petitioner and BISB and pursuant to the said agreement the first respondent was incorporated. It was at all times believed by BISB that the petitioner was entering into the agreement on behalf of himself and Kew as partners of Kontad Interior Decorations.

[7] It was a term of the agreement and was at all times the intention of the parties that the contribution of capital towards the first respondent's issued and paid up capital by the petitioner, Kew and BISB would be as follows:

(a) The petitioner would contribute fixed assets, a factory, plant and machinery, office equipment, motor vehicles, stocks etc to the first respondent ('the assets') valued at RM500,000 and would receive the sum of RM300,000 and 40% equity in the first respondent. The value of the 40% equity was pegged at RM200,000. The petitioner would therefore have capitalised his interest in the first respondent by transferring the assets worth RM500,000 to the first respondent and receiving 40% of the paid up capital of the first respondent together with cash of RM300,000 from BISB.

(b) Kew had a separate arrangement with the petitioner that he would receive half of the 40% equity that the petitioner would be allocated in the first respondent, ie 20% share in the first respondent. It has since transpired that Kew has waived his right to the 20% vis a vis the petitioner.

(c) BISB will capitalise its interest in the first respondent by paying the petitioner the RM300,000 for the assets that the petitioner would invest into the first respondent, (such payment being made by BISB on the first respondent's behalf) and BISB would be allocated 60% equity in the first respondent. In effect BISB would have capitalised their interest in the first respondent with a cash injection of RM300,000, (such cash in effect being paid over to the petitioner).

[8] With that intention and agreement, the first respondent was incorporated. The petitioner's 40% equity was issued and held by BISB for the petitioner's benefit and was awaiting to be transferred to the petitioner.

[9] BISB complied with their obligations and paid the RM300,000 capital contribution to the first respondent (which was paid to the petitioner for the agreed portion of the assets to be paid in cash) and in exchange BISB received 60% of the equity in the first respondent.

A **[10]** However, the petitioner then embarked on a course of conduct which was detrimental to the first respondent and relations soured between the then shareholders of the first respondent i.e. the petitioner as the beneficial shareholder and BISB.

B **[11]** Once the relationship soured, the business of the first respondent suffered and of course the value of the first respondent shares dropped. The petitioner unilaterally opted and decided at that stage not to take up the 40% equity in the first respondent and instead demanded money value for the 40% equity in the first respondent. This was not an option available or provided for in the agreement between the parties. A series of exchange of letters between the solicitors of the petitioner and BISB show the petitioner's views on the terms of the agreement. The petitioner's views as per the correspondence was that as he was entitled to 40% equity in the first respondent and as he did not want to take up the 40% equity, he requested BISB to buy him out for RM200,000.

D PETITIONER'S SUIT IN THE KL SESSION COURT

[12] The petitioner then claimed for BISB to compensate him for the value of the Assets he invested in monetary value of RM500,000, instead of the cash of RM300,000 and the 40% equity in the first respondent as agreed in the agreement. The petitioner filed a suit in the Kuala Lumpur Sessions Courts vide Summons No S12–52–16953 of 1999 ('the KL Sessions Court Suit').

[13] In the KL Sessions Court Suit, the petitioner was the plaintiff and BISB was the defendant. The petitioner pleaded, that he was entitled to both the balance monies for the assets, ie the sum of RM200,000 and to the 40% equity in the first respondent. It was BISB's stand and defence that the petitioner was not entitled to both the full value of the assets and to the 40% but only RM300,0000 (which was paid and accepted in full accord and satisfaction) and 40% equity in the first respondent (pegged at RM200,000) as agreed in the agreement.

[14] Despite the petitioner's pleaded facts in the statement of claim that he was entitled to both the RM200,000 and the 40% equity in the first respondent, the petitioner opted not to and did not seek the specific relief and remedy for the delivery of the 40% equity to him by BISB. This was despite a firm offer on the table by BISB for the petitioner to do so.

[15] The petitioner had instead chosen to make a claim for the sum of RM200,000 and damages and opted for the 40% equity in the first respondent to be translated into money value by his KL Session Court Suit.

[16] It is not in dispute that the petitioner, whether prior to or at the time of filing of the petition and/or until now or at any material time, was never registered as a shareholder or member of the first respondent and that the petitioner has by his KL Sessions Court Suit and has on oath confirmed that he does not want to accept a transfer of the shares in the first respondent to him.

[17] At all material times during the trial and proceedings in the KL Sessions Court Suit, BISB raised that the petitioner was only entitled to the 40% equity in the first respondent as their main defence to the petitioner's claim and led evidence to this effect.

[18] On 8 October 2004 after hearing all the evidence and upon the written submissions being filed, the decision made in the KL Sessions Court Suit was that BISB was to pay the sum of RM200,000 to the petitioner being the balance purchase price for the assets and did not allow the petitioner's claim for damages. BISB filed an appeal to the High Court on 21 October 2004 and which appeal is now fixed for hearing on 12 April 2006.

ISSUES TO BE DECIDED

[19] The issues to be decided by this court are as follows:

(a) whether the petitioner has no locus standi to present this petition as he is not a registered shareholder or member of the first respondent;

(b) whether the petitioner is estopped by his conduct in the previous proceedings filed by him (in the Kuala Lumpur Session Court) from filing and proceeding with the petition on the basis that he is a shareholder or member of the first respondent with the rights of a shareholder or member.

FINDINGS OF COURT

[20] The facts of the proceedings that have transpired in the KL Session Court are relevant to show the stand the petitioner took in the matter, the evidence given on oath by him and how the petitioner is bound by his own stand and is therefore estopped from filing the present petition.

[21] In the KL Session Court Suit, the petitioner has taken the following stand, namely:

(a) the petitioner had equated the sum of RM200,000 as being the value of 40% equity in the first respondent;

(b) the petitioner did not want to take or accept a transfer of the 40% equity in the first respondent as he wished to sell the same to the other respondents for the value of RM200,000; and

(c) the petitioner did not seek the specific remedy for the delivery of the 40% equity to him while he pleaded it and this confirms that he did not want to take or accept a transfer of the said shares.

[22] At all material times in the proceedings before the KL Sessions Court, BISB raised that the petitioner was only entitled to the 40% equity in the first respondent as their main defence and led evidence to this effect. The petitioner led evidence to rebut the respondent's defence.

A **[23]** Despite the stand taken above, the petitioner now claims himself to still be the 'beneficial owner' of the 40% equity in the first respondent, having taken no steps whatsoever to become the registered shareholder and in fact refusing to take/accept a transfer of the said shares, whether intentionally, negligently and/or inadvertently, when he could have and should have done so.

B

The Relevant Law

Who can be a petitioner under s 181 of the Companies Act 1965

C **[24]** The opening of s 181 provides as follows:

> (1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the Court for an order under this section on the ground…

D **[25]** Section 16(6) of the Companies Act 1965 which defines, 'Members of Company' reads as follows:

> The subscribers to the memorandum shall be deemed to have agreed to become members of the company and on the incorporation of the company shall be entered as members in its register of members, and every other person who agrees to become a member of a company and whose name is entered in its register of members shall be a member of the company.

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[26] In *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113, the Federal Court ruled the followings:

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> The category of persons within a company who may present a petition under s 181 of the Act would be, as a general rule, only one who comes within the terms of s 16(6). This would mean that a petitioner who applies under the section must be able to demonstrate that his name appears on a company's register of members at the date of presentation of the petition.
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> **G** Put another way, in general, a petitioner who applies under the section must be able to demonstrate that his name appears on a company's register of members at the date of presentation of the petition: if he is unable to do so, then he has no standing to invoke the jurisdiction conferred upon the court by the section.
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> There may be cases where an application of the general rule would be unfair. If it is unjust or inequitable to permit a respondent to a petition under section 181 to assert that a petitioner has no locus standi to move the court, then he will be estopped from so asserting. A respondent who is guilty of unconscionable or inequitable conduct will not be permitted to rely upon the requirement of membership in order to defeat a petitioner's standing as this would amount to his using statute as an engine of fraud.
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I **[27]** In the present case, it has not been disputed and in fact has been averred and admitted by the petitioner himself in his affidavits that he is not a registered shareholder or member of the first respondent and the petitioner is unable to demonstrate that his name appears on the first respondent's company register at the date of presentation of the petition.

[28] In *Niord Pty Ltd v Adelide Petroleum NL* (1990) 8 ACLC 684, the court in Australia held that an applicant must be registered as a member before he could complain of oppressive conduct and that a mere equitable interest as an unregistered transferee was not sufficient. A

[29] In *Re M Dalley & Co Pty Ltd* (1968) 1 ACLR 489, the question of standing was raised and the court ruled that the onus of proving that the petitioner was qualified under the then Australian equivalent of s 181 was on the petitioner. Lush J, in that case, further held that 'membership for that purpose could not be established unless it was shown that at the date of the petition, the petitioner was registered in the register as the holder of shares.' B C

[30] The s 181 remedy is a creature of statute and basically, unless the applicant comes squarely within the section, the court ought not to entertain the action. This position has been succinctly stated by Siti Norma Yaacob J, in *Verghese Mathai v Telok Plaintations Sdn Bhd & Ors* [1988] 3 MLJ 216 as follows: D

> As the petitioner's locus standi is regulated by statute, he must comply strictly with the mandatory provisions of section 181 '

[31] In the present case, the conduct of the petitioner in the KL Session Court Suit clearly indicates that the petitioner has waived his right to a member or shareholder of the first respondent and is now estopped from stating or claiming that the respondents are 'using statute as an engine of fraud' to assert that the petitioner has no locus standi to file this petition, allowing him to fall within the exception to general rule as laid down in *Owen Sim*. To do so would be to sanction an abuse of process of the courts by the petitioner and to allow the petitioner 'two bites to the cherry'. E F

[32] The petitioner knew all along that he was not a registered member or shareholder of the first respondent, positively refused to take transfer of the share to him (as what he did in the KL Session Court Suit) and failed to take any steps to rectify the register when he could have and should have done so earlier. As such, likened to the position off the respondent in *Owen Sim*, the petitioner herein should be estopped from exercising the statutory rights provided for the benefit of registered shareholders or member of a company as he has by his own conduct (in the KL Session Court Suit) deprived and disentitled himself of such rights. G H

[33] The law provides the means for which an aggrieved party can have the register of a company rectified if there is any issue of the company's register having omitted the party's name as a shareholder, ie under s 162 of the Companies Act 1965. Alternatively, if the dispute is such that it is unsuitable to be decided upon by the summary procedure provided for under s 162, the proper course is to file a suit against the company to resolve the issue (see: (i) In *Re Len Chee Omnibus Co Ltd; Chin Sow Lan v Lee Chee Omnibus Co Ltd & Ors* [1969] MLJ 202; and (ii) *Central Secutiries (Holdings) Bhd v Haron bin Mohamed Zaid* [1979] MLJ 244). I

[34] The petitioner has failed to establish that he is qualified to make out a claim under s 181 of the Companies Act 1965. On this ground alone, without having to go into the merit of the petitioner's complaints in the petition, this petition can be dismissed with costs.

RES JUDICATA/ESTOPPEL

[35] It is indisputable that the issue of the petitioner's rights and entitlement to the shares in the first respondent was raised at length in the earlier KL Session Court Suit but the petitioner elected not to proceed a determination on the issue. In fact, the petitioner had equated the sum of RM200,000 as being the value of 40% equity in the first respondent and did not want to take or accept a transfer of the 40% equity as he wished to sell the same to the other respondents for that value and also elected only to pursue a liquidated claim in lieu of the shares.

[36] By his earlier conduct and stand in the KL Session Court Suit, the petitioner has deprived and disentitled himself of the rights as shareholder or member of the first respondent. The petitioner cannot be allowed now to pursue a claim under s 181 of the Companies Act 1965, to claim oppression against him as a 'beneficial shareholder' of the first respondent when he could have and should have sought as such in the earlier proceedings or simply could have accepted a transfer of the shares (which were offered to him). This is a clear case where doctrine of res judicata and issue estoppel arises.

[37] The limited concept of estoppel applies where there must be (i) similarity in the cause of action; (ii) similarity in remedies claimed; and (iii) similarity in the parties. However, the wider concept of estoppel is not confined to causes of action or issues which the court actually asked to decide or has already decided. It covers also causes of action or issues of facts which, though not already decided as a result of the same not being brought forward due to negligence, inadvertence or deliberately, are so clearly part of the subject matter of the litigation and so clearly could have been raised, that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

[38] This principle was clearly laid down by the Supreme Court in *Asia Commercial Finance (M) Sdn Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 where it was held:

> In order to prevent multiplicity of action and also in order to protect the underlying rationales of extoppel per rem judicatum and not to act against them such estoppel of cause of action has been extended to all other causes of action (based on the same facts or issues) which should have been litigated or asserted in the original earlier action resulting in the final judgment, and which were not, either deliberately or due to inadvertence…
>
> There is one school of thought that issue estoppel applies only to issues actually decided by the court in the previous proceedings and not to issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, while another school of thought holds the contrary view that such issues, which might have been decided by the court are still covered by the doctrine per resjudicata, ie doctrine of estoppel per res judicatum.

We are of the opinion that the aforesaid contrary view is to be preferred; it represents for one thing, a correct even though broader approach to the scope of issue estoppel..

[39] Other cases which illustrate the same points and were also referred to and followed by the Supreme Court *Asia Commercial Finance* are as followed:

(i) *Public Trustee v Kenward* [1967] 1 WLR 1062;

(ii) *Yat Tung Investment Co v Dae Hong Bank & Anor* [1975] 2 WLR 690; and

(iii) *SCF Finance Co Ltd v Masri & Anor (No 3)* [1987] 1 All ER 194.

[40] In *SCF Finance Co Ltd*, the English Court of Appeal held that even a reservation of an issue by a party in a previous proceeding was ineffective to prevent the estoppel from arising against the said party, where the said party had pleaded that issue but not to proceed on the issue in the previous proceeding. It was held that the defendant in that case was not entitled to assert that issue afresh in subsequent proceedings even if that issue was not heard and determined and it was even 'reserved'.

[41] This is a clear case where the doctrine of res judicata and issue estoppel (in its wider sense as laid down by the Supreme Court in *Asia Commercial Finance* arises. The petitioner cannot now argue or be allowed to pursue a claim under s 181 to claim oppression against him as a 'beneficial shareholder' of the first respondent. The issue of him being entitled as a shareholder at the material time was not challenged as it was his own conduct in the KL Session Court Suit and not the conduct of the respondents that disentitled him of such rights. The right to file the petition is regulated by statute and is premised on the fact that the petitioner has the onus to prove that he is a 'member' of the first respondent company as defined in the Companies Act 1965, ie a registered shareholder and he has failed to do so.

[42] On this issue alone, the petition fails and can be dismissed.

[43] The petitioner contends that this petition cannot be determined summarily without the benefit of a thorough consideration of the evidence simply because of the nature of the allegations of oppression and/or fraud raised in the petition. The court is of the view that in the present case, the court need not and should not go into the minute examination of the alleged instances of oppression and/or fraud at this stage. If the petitioner has no locus standi to file the petition or in cases where the doctrine of res judicata or issues estoppel arises, it matter not whether the allegation of oppression and/or fraud are substianted or otherwise.

DECISION

[44] Based on the above considerations, it is the court's judgment that the petitioner has no locus standi and is estopped form filing the present petition.

A Therefore, the petition is struck out with costs and the respondent's notice of motion (encl 8) is allowed with costs.

Respondents' application allowed with costs. Petition struck out.

B Reported by John Paul Simon

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